

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JASON B. MATSON,
Defendant.

No. CR-07-141-FVS

FINDINGS, CONCLUSIONS,
AND ORDER

THIS MATTER came before the Court for an evidentiary hearing based upon Jason Matson's motion to suppress evidence. The hearing occurred on May 2, 2008, June 3, 2008, and June 20, 2008. Mr. Matson was represented by Robert R. Fischer and Kailey E. Moran. The government was represented by Jared C. Kimball.

SUMMARY

At about 9:50 p.m. on October 2, 2007, agents of the United States Border Patrol observed Jason Matson drive into the parking lot of a store that had closed for the night. The store is located approximately 300 yards south of the border between the United States and Canada. During the 20 minutes preceding Mr. Matson's arrival, electronic sensors were triggered in the area between the border and the store. The sequence in which the sensors were triggered indicated to the agents that at least one person had crossed the border and was approaching the store by means of a trail. Mr. Matson saw the Border

1 Patrol agents, made a call from a pay phone, and drove back in the
2 direction from which he had come. As he drove south on State Route
3 21, followed by Agent Jay Engebretson, the sensors between the store
4 and the border were again triggered. The sequence indicated that a
5 person was walking back toward Canada. Agent Engebretson followed Mr.
6 Matson for approximately five miles. When he reached the place where
7 Agent John Porter was parked, Agent Engebretson pulled Mr. Matson
8 over. The information that the agents learned during the course of
9 the stop deepened their suspicions. Agent Porter radioed a Border
10 Patrol dispatcher and asked the dispatcher to contact Agent Daniel
11 McElheran, who has a dog that is trained to detect controlled
12 substances. Agent McElheran was at home. He arrived with his dog at
13 the scene of the stop approximately 10 to 15 minutes after receiving
14 the call. He had the dog sniff Mr. Matson's car. The dog reacted in
15 a manner that indicated the presence of a controlled substance.
16 Border Patrol agents searched the car without a warrant. Mr. Matson
17 moves to suppress the evidence that they obtained. He argues that the
18 initial stop violated the Fourth Amendment, and that, even if it did
19 not, it was unreasonable for the agents to detain him pending Agent
20 McElheran's arrival. Finally, he argues that the dog's reaction was
21 not a valid indication that the car contained a controlled substance.

22 FINDINGS OF FACT

- 23 1. The village of Danville, Washington, is located just south of
24 the border between the United States and Canada.
- 25 2. The area is geographically remote and rugged. It is sparsely
26 populated on the American side of the border.

1 3. There is a Port of Entry at Danville. It closes at midnight.

2 4. The Danville Market is located in the State of Washington
3 approximately 300 yards south of the border.

4 5. Smugglers frequently cross the border near the store. So
5 serious is the problem that the Border Patrol has placed electronic
6 sensors in the area.

7 6. On or about October 1, 2007, Border Patrol agents found
8 Ritalin and Ecstasy pills along a trail on the hillside behind the
9 store. The type and location of the pills indicated that they had
10 been smuggled.

11 7. Agents expected smuggling during the night of October 2nd.

12 8. That evening, Agent John Porter parked approximately five
13 miles south of Danville at the intersection of State Route 21 and Big
14 Goosmus Road.

15 9. Another agent hid along the east side of the Kettle River,
16 using his binoculars to watch the area around the store.

17 10. Agents Jay Engebretson, Scott Harper, and Domonic Lofland
18 drove in separate vehicles to the parking lot of the store. They
19 began formulating a plan to intercept smugglers that night. The store
20 was closed.

21 11. Shortly after 9:30 p.m., a Border Patrol dispatcher began
22 informing the agents that electronic monitoring devices were being
23 triggered near the store.

24 12. Sensors were triggered at 9:33 p.m., 9:39 p.m., 9:47 p.m.,
25 and 9:49 p.m.

26 13. The fact that the sensors were being triggered in this order

1 indicated that at least one person had entered the United States from
2 Canada and was walking along a trail on the hillside behind the store.

3 14. At about 9:50 p.m., a Chevy Cobalt pulled into the store's
4 parking lot and stopped near the gas pumps.

5 15. It is unlikely that the driver saw the agents' vehicles until
6 he pulled into the parking lot.

7 16. The driver waited in the car for a minute or two and then
8 walked to a pay phone and made a call. The call occurred at 9:52 p.m.
9 and lasted less than one minute.

10 17. An agent radioed the car's license number to a dispatcher,
11 who said it was a rental vehicle.

12 18. The agents knew that smugglers often use rental cars instead
13 of personal vehicles in order to conceal their identities and avoid
14 forfeiture of personal vehicles in the event of arrest.

15 19. The driver got back into the Chevy Cobalt and pulled onto the
16 highway.

17 20. Instead of driving north to the border, he drove south (*i.e.*,
18 the direction from which he had come). Agent Engebretson followed
19 him.

20 21. After the rental car drove south, electronic sensors were
21 again triggered; this time, in a manner indicating that at least one
22 person was walking north toward the border.

23 22. When the Chevy Cobalt reached Big Goosmus Road, which is
24 where Agent Porter was parked, Agent Engebretson pulled the car over.

25 23. The stop began at approximately 10:00 p.m.

26 24. The driver was the sole occupant. He was smoking a

1 cigarette.

2 25. Agent Engebretson asked him to state his citizenship. The
3 driver said he is an American.

4 26. Agent Engebretson asked what he was doing in the area. He
5 said he was looking for the Town of Republic.

6 27. Agent Engebretson asked for identification. He produced a
7 driver's license that identified him as Jason B. Matson.

8 28. Mr. Matson was taking repeated drags from his cigarette. His
9 hands shook as he handed his license to Agent Engebretson.

10 29. Agent Engebretson asked a Border Patrol dispatcher to run a
11 records check.

12 30. The dispatcher advised Agent Engebretson that there were no
13 warrants for Mr. Matson's arrest, but that "his criminal history was
14 positive for a 1046."

15 31. The number 1046 indicates a narcotics conviction. It can be
16 either a misdemeanor or a felony conviction.

17 32. Agent Engebretson returned to the rental car and again asked
18 Mr. Matson where he was going. He said he was looking for a friend's
19 house in Republic. This seemed odd to Agent Engebretson. One would
20 not expect a person who had driven north in search of Republic to be
21 at the border. In addition, Mr. Matson's body language and manner of
22 speaking suggested to Agent Engebretson that he was unusually anxious.

23 33. Agent Engebretson walked back to where Agent Porter was
24 standing and discussed the situation with him.

25 34. Agent Porter asked a dispatcher to contact Agent Daniel
26 McElheran, who has a dog that is trained to detect controlled

1 substances. Agent Porter asked the dispatcher to have Agent McElheran
2 bring his dog to the place where Mr. Matson was detained.

3 35. Agent Engebretson handcuffed Mr. Matson and placed him in the
4 back of another law enforcement officer's patrol car.

5 36. Agent McElheran was at home. He received the call between
6 10:00 and 10:15 p.m. It took him approximately 10-15 minutes to drive
7 to the place where Mr. Matson was being detained.

8 37. Based upon the training that Agent McElheran's dog has
9 received, and based upon the dog's performance during training and in
10 the field, the dog is a reliable detector of controlled substances.

11 38. Agent McElheran had his dog sniff the rental car. The dog
12 reacted in a manner indicating the presence of a controlled substance
13 in the trunk of the car.

14 39. The dog's reaction was a valid indication that a controlled
15 substance was present.

16 **INVESTIGATORY STOP**

17 The Fourth Amendment guarantees the right of the people to be
18 free from unreasonable seizures. *See, e.g., Whren v. United States*,
19 517 U.S. 806, 809, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996).
20 Fourth Amendment seizures may be divided into two categories, viz.,
21 investigatory stops and arrests. An investigatory stop is justified
22 "'where a police officer observes unusual conduct which leads him
23 reasonably to conclude in light of his experience that criminal
24 activity may be afoot" *Minnesota v. Dickerson*, 508 U.S. 366,
25 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) (quoting *Terry v. Ohio*, 392
26 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889 (1968)). In such

1 circumstances, "the officer may briefly stop the suspicious person and
2 make 'reasonable inquiries' aimed at confirming or dispelling his
3 suspicions." *Id.* An investigatory stop must be supported by
4 reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 7, 109
5 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). Whether reasonable suspicion
6 exists depends upon "the totality of the circumstances surrounding the
7 stop." *United States v. Hall*, 974 F.2d 1201, 1204 (9th Cir.1992).
8 "This includes the 'collective knowledge of the officers involved, and
9 the inferences reached by experienced, trained officers.'" *Id.*
10 (quoting *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568,
11 1575, 84 L.Ed.2d 605 (1985)). This case differs from many cases
12 involving investigatory stops in that the stop was effected by a
13 Border Patrol agent near the Canadian border. Given this
14 circumstance, the Court must consider the following factors when
15 analyzing the reasonableness of the agents' actions:

16 (1) characteristics of the area; (2) proximity to the
17 border; (3) usual patterns of traffic and time of day; (4)
18 previous alien or drug smuggling in the area; (5) behavior
19 of the driver, including 'obvious attempts to evade
20 officers'; (6) appearance or behavior of passengers; (7)
model and appearance of the vehicle; and, (8) officer
experience.

21 *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir.2007).¹

22 Mr. Matson argues that a careful analysis of the preceding
23 factors reveals that the agents lacked a reasonable basis for
24 suspecting he was involved in criminal activity. It is not the

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26 ¹The factors are drawn from *United States v. Brignoni-Ponce*,
422 U.S. 873, 884-5, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607 (1975).

1 sparsely populated area described by the government, he says. If one
2 includes those who live on the Canadian side of the border, a
3 significant number of people live in the Danville area. The Danville
4 Market is not far from the Port of Entry, which remains open until
5 midnight. In Mr. Matson's opinion, there is nothing unusual about a
6 motorist pulling into the parking lot of a store and using a pay phone
7 to make a call; especially where, as in the Danville area, there is
8 uneven cell phone coverage. Nor, according to Mr. Matson, is there
9 anything unusual about the fact that he was driving a rental car.
10 Many travelers do. Furthermore, travelers make wrong turns. A person
11 driving from Spokane, Washington, to Republic could make a wrong turn,
12 miss a sign or two, and end up in Danville. Mr. Matson acknowledges
13 that the electronic sensors went off, but he points out that they are
14 merely mechanical devices and that the agents never did observe anyone
15 that night on the hillside above the store. As Mr. Matson sees it,
16 little or nothing may be inferred from the fact that he pulled into
17 the parking lot of the store in a rental car and made a call from a
18 pay phone. Finally, he argues that the agents' suspicions should have
19 been dispelled by his behavior during the stop. He promptly pulled
20 over and produced a valid vehicle registration and driver's license.

21 The government views the evidence much differently. According to
22 the government, the American side of the border is sparsely populated.
23 The Danville Market is the only business on this side and it was
24 closed when the defendant arrived. The government submits that, at
25 10:00 p.m., there is little or no traffic on Highway 21 near the store
26 despite the fact that the Port of Entry is open until midnight.

1 However, smuggling is common. A day or two before this incident,
2 Border Patrol agents found a number of Ritalin and Ecstasy pills lying
3 on a trail near the store. Indeed, just before Mr. Matson arrived,
4 electronic sensors went off in the area between the border and the
5 store. The sequence in which the sensors were triggered suggested
6 that a person was walking toward the store. At about the same time,
7 Mr. Matson arrived in a rental car; a type of car which drug
8 traffickers often use. He saw the agents, made a brief phone call,
9 and left. Instead of driving north to the Port of Entry, which is
10 what one would have expected, he returned in the direction from which
11 he had come. As he drove south, the sensors were again triggered.
12 This time, the sequence indicated that a person was walking back
13 toward the border.

14 After considering the record as a whole, the Court is satisfied
15 that the agents had a reasonable basis for suspecting that Mr. Matson
16 was involved in smuggling. While he posits innocent explanations for
17 each of his behaviors, the existence of potentially innocent
18 explanations is not dispositive. Taken together, individual instances
19 of innocent conduct may amount to reasonable suspicion. *Sokolow*, 490
20 U.S. at 9-10, 109 S.Ct. at 1586-87. That principle applies with
21 particular force here. An objective law enforcement officer in the
22 agents' position reasonably would have suspected Mr. Matson of
23 smuggling. Viewed in its entirety, the information available to the
24 agents strongly suggested that someone had illegally crossed the
25 border in order to meet Mr. Matson at the Danville Market at about
26 10:00 p.m. Mr. Matson saw the agents and aborted the meeting. After

1 doing so, he headed back in the direction from which he had come.
2 Agent Engebretson properly stopped and questioned him.

3 **LENGTH OF INVESTIGATORY STOP**

4 When a law enforcement officer makes an investigatory stop, he
5 may not prolong questioning beyond the amount of time reasonably
6 necessary to resolve the suspicion that gave rise to the stop.
7 *Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 1471, 161 L.Ed.2d
8 299 (2005). Whether an officer has unconstitutionally prolonged a
9 stop depends upon the reasonableness of his actions when viewed in
10 light of the totality of the circumstances. See *United States v.*
11 *Turvin*, 517 F.3d 1097, 1101 (9th Cir.2008). Here, the agents' initial
12 suspicions were not promptly resolved at the outset of the stop. To
13 the contrary, they were reinforced by Mr. Matson's nervous behavior,
14 his suspicious explanation of his presence in Danville, and his
15 criminal history. Given all of the information which was available to
16 Agents Porter and Engebretson at that point, it was reasonable for
17 them to request the assistance of Agent McElheran and his dog. Not
18 only that, but also it was reasonable for Agent Engebretson to detain
19 Mr. Matson while he waited for Agent McElheran. Mr. Matson had a
20 criminal conviction. The stop occurred at night alongside a highway
21 in a remote, rugged area. His behavior during the course of the stop
22 suggested that he was agitated. Had he fled on foot, it would have
23 been difficult, if not impossible, for the agents to overtake and
24 apprehend him. Thus, handcuffing him and placing him in the back of a
25 patrol car were reasonable precautions. He did not have to wait long
26 in the patrol car. Agent McElheran and his dog arrived within 10 or

1 15 minutes. At that point, less than 35 minutes had elapsed since the
2 stop began. While that is a significant period of time in the context
3 of an investigatory stop, it was not an unreasonable period of time in
4 light of the totality of the circumstances.

5 **DOG SNIFF**

6 Having the dog sniff the car was not a search within the meaning
7 of the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 408-10,
8 125 S.Ct. 834, 837-38, 160 L.Ed.2d 842 (2005). The dog was well
9 trained and had performed competently during training and in the
10 field. Agent McElheran knew how to interpret the dog's behavior.
11 Consequently, the manner in which the dog reacted when near the trunk
12 of the car established probable cause to believe that the trunk
13 contained a controlled substance. *See United States v. Cedano-*
14 *Arellano*, 332 F.3d 568, 573 (9th Cir.2003). Once the agents had
15 probable cause to believe that Mr. Matson's car contained a controlled
16 substance, they were entitled to conduct a warrantless search "of
17 every part of the vehicle and its contents . . . that [might have]
18 conceal[ed] the object of the search." *United States v. Ross*, 456
19 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

20 **IT IS HEREBY ORDERED:**

21 The defendant's motion to suppress (**Ct. Rec. 35**) is denied.

22 **IT IS SO ORDERED.** The District Court Executive is hereby
23 directed to enter this order and furnish copies to counsel.

24 **DATED** this 3rd day of October, 2008.

25 s/ Fred Van Sickle
26 Fred Van Sickle
Senior United States District Judge